

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAY STRAW,) Case No. EDCV 12-01280-JEM
Plaintiff,)
v.) MEMORANDUM OPINION AND ORDER
CAROLYN W. COLVIN,) AFFIRMING DECISION OF THE
Acting Commissioner of Social Security,) COMMISSIONER OF SOCIAL SECURITY
Defendant.)

PROCEEDINGS

On August 14, 2012, Ray Straw (“Plaintiff” or “Claimant”) filed a complaint seeking review of the decision by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s applications for Social Security Disability Insurance benefits and Supplemental Security Income benefits. The Commissioner filed an Answer on November 15, 2012. On February 13, 2013, the parties filed a Joint Stipulation (“JS”). The matter is now ready for decision.

25 Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this Magistrate
26 Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court
27 concludes that the Commissioner’s decision must be affirmed and this case dismissed with
28 prejudice.

BACKGROUND

Plaintiff is a 47 year old male who applied for Social Security Disability Insurance benefits and Supplemental Security Income benefits on July 14, 2006. (AR 8.) The ALJ determined that Plaintiff has not engaged in substantial gainful activity since April 2, 2002, the alleged onset date of his disability. (AR 10.)

Plaintiff's claims were denied initially on September 14, 2006, and on reconsideration on February 16, 2007. (AR 8.) Plaintiff filed a timely request for hearing, which was held before Administrative Law Judge ("ALJ") F. Keith Varni on March 28, 2008, in San Bernardino, California. (AR 8.) The ALJ issued an unfavorable decision on August 19, 2008. (AR 8-13.) The Appeals Council denied review on January 16, 2009. (AR 1-3.)

Litigation ensued in this Court with a complaint filed by Plaintiff on March 16, 2009 (Civil Docket # 5:09-CV-00511-JEM), and on June 8, 2010, this Court reversed the 2008 hearing decision and remanded the case for further proceedings with regard to credibility, developing the record, and considering all impairments in combination. (AR 351-62.) The Appeals Council remanded the case for further proceedings consistent with this Court's decision on August 28, 2010. (AR 347-50.)

ALJ Tamara Turner-Jones conducted a second hearing on March 2, 2011. (AR 364-426.) She subsequently granted a partially favorable decision on March 22, 2011. (AR 455-69.) She granted benefits for a closed period, from February 6, 2003, through February 7, 2008, but denied benefits thereafter. (AR 464-5.)

DISPUTED ISSUES

As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as grounds for reversal and remand:

1. Whether the ALJ properly assessed Plaintiff's credibility.
 2. Whether the ALJ properly considered Plaintiff's residual functional capacity ("RFC").
 3. Whether the ALJ properly developed the record.

4. Whether the ALJ properly considered the February 2010 treating source statement at AR 601.
 5. Whether the ALJ properly considered Plaintiff's severe impairment at Step 2.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and based on the proper legal standards).

Substantial evidence means “more than a mere scintilla,’ but less than a preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at 401 (internal quotation marks and citation omitted).

This Court must review the record as a whole and consider adverse as well as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where evidence is susceptible to more than one rational interpretation, the ALJ's decision must be upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

THE SEQUENTIAL EVALUATION

The Social Security Act defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or . . . can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has

1 established a five-step sequential process to determine whether a claimant is disabled. 20
 2 C.F.R. §§ 404.1520, 416.920.

3 The first step is to determine whether the claimant is presently engaging in substantial
 4 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is engaging
 5 in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert, 482 U.S. 137,
 6 140 (1987). Second, the ALJ must determine whether the claimant has a severe impairment or
 7 combination of impairments. Parra, 481 F.3d at 746. An impairment is not severe if it does not
 8 significantly limit the claimant's ability to work. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.
 9 1996). Third, the ALJ must determine whether the impairment is listed, or equivalent to an
 10 impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the regulations. Parra, 481 F.3d
 11 at 746. If the impairment meets or equals one of the listed impairments, the claimant is
 12 presumptively disabled. Bowen v. Yuckert, 482 U.S. at 141. Fourth, the ALJ must determine
 13 whether the impairment prevents the claimant from doing past relevant work. Pinto v.
 14 Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).

15 Before making the step four determination, the ALJ first must determine the claimant's
 16 residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). Residual functional capacity
 17 ("RFC") is "the most [one] can still do despite [his or her] limitations" and represents an
 18 assessment "based on all the relevant evidence." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).
 19 The RFC must consider all of the claimant's impairments, including those that are not severe.
 20 20 C.F.R. §§ 416.920(e), 416.945(a)(2); Social Security Ruling ("SSR") 96-8p.

21 If the claimant cannot perform his or her past relevant work or has no past relevant work,
 22 the ALJ proceeds to the fifth step and must determine whether the impairment prevents the
 23 claimant from performing any other substantial gainful activity. Moore v. Apfel, 216 F.3d 864,
 24 869 (9th Cir. 2000). The claimant bears the burden of proving steps one through four,
 25 consistent with the general rule that at all times the burden is on the claimant to establish his or
 26 her entitlement to benefits. Parra, 481 F.3d at 746. Once this *prima facie* case is established
 27 by the claimant, the burden shifts to the Commissioner to show that the claimant may perform
 28 other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support

1 a finding that a claimant is not disabled at step five, the Commissioner must provide evidence
 2 demonstrating that other work exists in significant numbers in the national economy that the
 3 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R.
 4 § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
 5 entitled to benefits. Id.

6 THE LEGAL STANDARDS REGARDING 7 MEDICAL IMPROVEMENT

8 The ALJ found Plaintiff to be disabled from February 6, 2003, through February 7, 2008.
 9 (AR 464-465.) The ALJ also found that medical improvement occurred as of February 8, 2008
 10 (AR 465), and that Plaintiff's disability ended on that date. (AR 468.) Plaintiff challenges the
 11 ALJ's decision in regard to the period beginning February 8, 2008.

12 "Once a claimant has been found to be disabled, . . . a presumption of continuing
 13 disability arises in her favor[, and the Commissioner] bears the burden of producing evidence
 14 sufficient to rebut this presumption of continuing disability." Bellamy v. Sec'y of Health &
Human Serv., 755 F.2d 1380, 1381 (9th Cir. 1985); see also Murray v. Heckler, 722 F.2d 499,
 15 500 (9th Cir. 1983) (disability benefits cannot be terminated without evidence of improvement
 16 which is reviewed under the substantial evidence standard).

17 A recipient whose condition has improved medically so that he is able to engage in
 18 substantial gainful activity is no longer disabled. 42 U.S.C. § 1382c(a)(4); 20 C.F.R. § 416.994;
Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1459 (9th Cir. 1995). A medical
 20 improvement is:

21 [A]ny decrease in the medical severity of [a recipient's] impairment(s) which
 22 was present at the time of the most recent favorable medical decision that
 23 [the recipient was] disabled or continued to be disabled. A determination
 24 that there has been a decrease in medical severity must be based on
 25 changes (improvement) in the symptoms, signs and/or laboratory findings
 26 associated with [the recipient's] impairment(s) . . .

27 20 C.F.R. § 416.994(b)(1)(i), (2)(i).

1 The ALJ applied and followed the eight-step evaluation process set forth in 20 C.F.R.
2 § 416.994 for Title II claims to determine if a claimant continues to be disabled.

3 At step one, the ALJ must determine if Claimant is engaging in substantial gainful
4 activity. 20 C.F.R. § 404.1594(f)(1).

5 At step two, the ALJ must determine whether the claimant has an impairment or
6 combination of impairments that meets or medically equals the criteria of an impairment listed in
7 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d), 416.925, and 416.926). If
8 the claimant does, his disability continues (20 C.F.R. § 416.994(b)(5)(i)).

9 At step three, the ALJ must determine whether medical improvement has occurred (20
10 C.F.R. § 416.994(b)(5)(ii)). Medical improvement is any decrease in medical severity of the
11 impairment(s) as established by improvement in symptoms, signs, and/or laboratory findings
12 (20 C.F.R. § 416.994(b)(1)(i)). If medical improvement has occurred, the analysis proceeds to
13 the fourth step. If not, the analysis proceeds to the fifth step.

14 At step four, the ALJ must determine whether medical improvement is related to the
15 ability to work (20 C.F.R. § 416.994(b)(5)(iii)). Medical improvement is related to the ability to
16 work if it results in an increase in the claimant's capacity to perform basic work activities (20
17 C.F.R. § 416.994(b)(1)(iii)). If it does, the analysis proceeds to the sixth step.

18 At step five, the ALJ must determine if an exception to medical improvements applies (20
19 C.F.R. § 416.994(b)(5)(iv)). There are two groups of exceptions (20 C.F.R. § 416.994(b)(3) and
20 (b)(4)). If one of the first group exceptions applies, the analysis proceeds to the sixth step. If
21 one of the second group exceptions applies, the claimant's disability ends. If none apply, the
22 claimant's disability continues.

23 At step six, the ALJ must determine whether all the claimant's current impairments in
24 combination are severe (20 CFR § 416.994(b)(5)(v)). If all current impairments in combination
25 do not significantly limit the claimant's ability to do basic work activities, the claimant is no
26 longer disabled. If they do, the analysis proceeds to step seven.

27 At step seven, the ALJ must assess the claimant's residual functional capacity based on
28 the current impairments and determine if she can perform past relevant work (20 CFR

1 § 416.994(b)(5)(vi)). If the claimant has the capacity to perform past relevant work, her
2 disability has ended. If not, the analysis proceeds to step eight.

3 At step eight, the ALJ must determine whether other work exists that the claimant can
4 perform, given her residual functional capacity and considering her age, education, and past
5 work experience (20 CFR § 416.994(b)(5)(vii)). If the claimant can perform other work, she is
6 no longer disabled. If the claimant cannot perform other work, her disability continues. In order
7 to support a finding that an individual is not disabled at this step, the Social Security
8 Administration is responsible for providing evidence that demonstrates that other work exists in
9 significant numbers in the national economy that the claimant can do, given her residual
10 functional capacity, age, education, and work experience.

11 THE ALJ DECISION

12 In this case, the ALJ determined at step one of the sequential process that Plaintiff has
13 not engaged in substantial gainful activity since April 2, 2002, the alleged onset date. (AR 463.)

14 At step two, the ALJ determined that Plaintiff has the following severe dermatological
15 impairments: Schamberg's dermatitis cellulitis bilateral plantar cysts, mild degenerative left
16 knee joint disease, and hypertension. (AR 463.)

17 At step three, the ALJ determined that beginning on February 8, 2008, Plaintiff does not
18 have an impairment or combination of impairments that meets or medically equals one of the
19 listed impairments. (AR 465.)

20 The ALJ then found that beginning on February 8, 2008, Plaintiff has the RFC to perform
21 light work with the following limitations:

22 Lift and carry twenty pounds occasionally and ten pounds frequently, sit six
23 hours in an eight-hour workday, stand and walk two hours in an eight hour
24 workday, alternate between sitting and standing in one hour intervals,
25 occasionally kneel, stoop, crawl and crouch, never climb ladders, ropes or
26 scaffolds, occasionally climb ramps and stairs, no restriction on hands for
27 fine manipulations, and avoid exposure to extreme temperatures and
28 concentrated contact with the skin of irritants such as cleaners.

1 (AR 466.) In determining this RFC, the ALJ made an adverse credibility determination. (AR
 2 466.)

3 At step four, the ALJ found that beginning on February 8, 2008, Plaintiff is unable to
 4 perform his past relevant work as a cleaner, driver, kitchen helper, and maintenance supervisor.
 5 (AR 467.) At step five, however, the ALJ found that there are also jobs that exist in significant
 6 numbers in the national economy that Claimant can perform, including cashier, food and
 7 beverage order clerk and assembler. (AR 468.)

8 Consequently, the ALJ found Claimant's disability ended on February 8, 2008. (AR 468.)

9 DISCUSSION

10 The ALJ decision must be affirmed. The ALJ's RFC is supported by substantial
 11 evidence. The ALJ's non-disability determination is supported by substantial evidence and free
 12 of legal error.

13 I. THE ALJ PROPERLY DISCOUNTED PLAINTIFF'S CREDIBILITY

14 Plaintiff contends that the ALJ improperly discounted his credibility. The Court
 15 disagrees.

16 A. Relevant Federal Law

17 The test for deciding whether to accept a claimant's subjective symptom testimony turns
 18 on whether the claimant produces medical evidence of an impairment that reasonably could be
 19 expected to produce the pain or other symptoms alleged. Bunnell v. Sullivan, 947 F.2d 341,
 20 346 (9th Cir. 1991); see also Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998); Smolen v.
 21 Chater, 80 F.3d at 1281-82 esp. n.2. The Commissioner may not discredit a claimant's
 22 testimony on the severity of symptoms merely because they are unsupported by objective
 23 medical evidence. Reddick, 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds
 24 the claimant's pain testimony not credible, the ALJ "must specifically make findings which
 25 support this conclusion." Bunnell, 947 F.2d at 345. The ALJ must set forth "findings sufficiently
 26 specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's
 27 testimony." Thomas, 278 F.3d 947, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261
 28 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of

1 malingering, the ALJ can reject the claimant's testimony about the severity of a claimant's
 2 symptoms only by offering "specific, clear and convincing reasons for doing so." Smolen, 80
 3 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what testimony is
 4 not credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722; Smolen, 80
 5 F.3d at 1284.

6 **B. Analysis**

7 In determining Plaintiff's RFC , the ALJ concluded that Plaintiff's medically determinable
 8 impairments reasonably could be expected to cause her alleged symptoms. (AR 466.) The
 9 ALJ, however, found that Plaintiff's statements regarding the intensity, persistence and limiting
 10 effects of these symptoms are not credible to the extent inconsistent with the ALJ's RFC. (AR
 11 466.) Because the ALJ did not make a finding of malingering, she was required to provide clear
 12 and convincing reasons supported by substantial evidence to discount Plaintiff's credibility. The
 13 ALJ did so.

14 First, the ALJ found that Plaintiff's allegations of disabling symptoms were not credible
 15 because the medical evidence on which the ALJ's RFC is based established medical
 16 improvement. (AR 465, 466.) An ALJ is entitled to consider whether there is a lack of medical
 17 evidence to corroborate a claimant's subjective symptom testimony so long as it is not the only
 18 reason for discounting the claimant's testimony. Burch v. Barnhart, 400 F.3d 676, 680-681 (9th
 19 Cir. 2005). Here, the ALJ found that Claimant's dermatitis had improved clinically and
 20 symptomatically as of February 8, 2008, and had been stable since. (AR 465.) The ALJ found
 21 a clear and significant decrease in the signs and symptoms due to Claimant's dermatitis. (AR
 22 465.) Substantial evidence supports these findings. On February 7, 2008, Plaintiff reported
 23 that, while still in pain, his feet were in the "best condition they have ever been." (AR 464.)
 24 Plaintiff's dermatitis was stable and improved with various skin and pain medications and with
 25 orthotic shoes. (AR 464.) Impairments that can be treated effectively are not disabling. Warre
 26 v. Comm'r of Soc. Sec. Adm., 439 F.3d 1001, 1006 (9th Cir. 2006). As for Plaintiff's knees, he
 27 has mild degenerative disease in both knees (AR 465), but his functional mobility and balance

1 are fair (AR 465), and he does not need an assistive device (AR 465) or orthopedic surgery.
2 (AR 464.) Claimant's hypertension was found readily controllable. (AR 463.)

3 Second, the ALJ found Plaintiff's testimony undermined by conservative treatment,
4 including medication, orthotic shoes, and a physician's finding that he did not need orthopedic
5 surgery. (AR 464.) Conservative treatment is a valid basis for discounting a claimant's
6 credibility. Tommasetti v. Astrue, 533 F.3d 1035, 1039-40 (9th Cir. 2008).

7 Third, the ALJ found that Plaintiff's activities of daily living were inconsistent with his
8 claimed limitations, which is a legitimate factor in assessing credibility. Bunnell, 947 F.2d at
9 345-46. Here, the ALJ found that, while Claimant can stand and walk only occasionally and
10 might have to alternate sitting and standing, "he admitted he could walk a maximum of 100
11 yards at a steady pace and get out and shop independently as needed and that he did not need
12 to use a cane." (AR 467.) He testified at the hearing he takes out the trash and does his own
13 laundry. (AR 378.)

14 Fourth, the ALJ found that Plaintiff's testimony regarding medication side effects was
15 never reflected in any treatment records. (AR 467.) Miller v. Heckler, 770 F.2d 845, 849 (9th
16 Cir. 1985) (no clinical evidence of medication side effects). Even passing mentions of side
17 effects are insufficient unless they are severe enough to interfere with claimant's ability to work.
18 Osenbrock v. Apfel, 240 F.3d 1157, 1164 (9th Cir. 2001). The ALJ's rejection of Plaintiff's
19 medication side effects testimony was reasonable and based on substantial evidence.

20 Plaintiff disputes the ALJ's interpretation of the record evidence, but it is the ALJ who is
21 responsible for resolving conflicts in the medical evidence and ambiguities in the record.
22 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the ALJ's interpretation is
23 reasonable, as it is here, it should not be second-guessed. Rollins, 261 F.3d at 857.

24 The ALJ discounted Plaintiff's credibility for clear and convincing reasons supported by
25 substantial evidence.

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1 **II. THE ALJ'S RFC IS SUPPORTED BY SUBSTANTIAL EVIDENCE**

2 Plaintiff contends that the ALJ's RFC did not take into account his pain and limitations
3 testimony. This is plainly untrue. The ALJ considered and then discounted Plaintiff's credibility.
4 The Court has determined that the ALJ properly discounted Plaintiff's credibility for clear and
5 convincing reasons supported by substantial evidence. Plaintiff's contention is moot.

6 Also untrue is Plaintiff's contention that the ALJ's RFC is not based on any medical
7 opinion for the period beginning February 8, 2008. The ALJ relied on medical evidence to
8 determine that Plaintiff had achieved medical improvement on February 8, 2008. The ALJ's
9 opinion makes numerous references to post-February 8, 2008, medical evidence. (AR 463,
10 464, 465.)

11 **III. THE ALJ PROPERLY DEVELOPED THE RECORD**

12 Plaintiff next contends that the ALJ failed to properly develop the record. In particular,
13 Plaintiff contends that there were no medical source opinions about Plaintiff's functional
14 limitations other than those rejected by this Court in its prior opinion. These contentions lack
15 merit.

16 An ALJ's duty to develop the record further is triggered only when there is ambiguous
17 evidence or when the record is inadequate to allow for proper evaluation of the evidence.

18 Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001). Here, the ALJ properly found the
19 record sufficient to evaluate whether Plaintiff was disabled, and there is no indication that the
20 ALJ did not obtain all relevant medical records from Plaintiff's treating and examining sources.

21 This Court, moreover, did not reject medical opinions in the prior opinion. It stated that
22 the record concerning Plaintiff's Schamberg's disease was not properly developed. On
23 remand, the ALJ further developed the record (AR 530-617) and then considered all available
24 medical evidence in evaluating that medical condition.

25 The ALJ did not err in failing to develop the record further.

1 **IV. THE ALJ PROPERLY REJECTED THE TREATING SOURCE
OPINION AT AR 601**

2 Plaintiff contends that the ALJ improperly rejected the opinion of treating physician
3 Dr. Sayuri Tokutake. The Court disagrees.

4 **A. Relevant Federal Law**

5 In evaluating medical opinions, the case law and regulations distinguish among the
6 opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2)
7 those who examine but do not treat the claimant (examining physicians); and (3) those who
8 neither examine nor treat the claimant (non-examining, or consulting, physicians). See 20
9 C.F.R. §§ 404.1527, 416.927; see also *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). In
10 general, an ALJ must accord special weight to a treating physician's opinion because a treating
11 physician "is employed to cure and has a greater opportunity to know and observe the patient
12 as an individual." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). If
13 a treating source's opinion on the issues of the nature and severity of a claimant's impairments
14 is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is
15 not inconsistent with other substantial evidence in the case record, the ALJ must give it
16 "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

17 Where a treating doctor's opinion is not contradicted by another doctor, it may be
18 rejected only for "clear and convincing" reasons. *Lester*, 81 F.3d at 830. However, if the
19 treating physician's opinion is contradicted by another doctor, such as an examining physician,
20 the ALJ may reject the treating physician's opinion by providing specific, legitimate reasons,
21 supported by substantial evidence in the record. *Lester*, 81 F.3d at 830-31; see also *Orn*, 495
22 F.3d at 632; *Thomas*, 278 F.3d at 957. Where a treating physician's opinion is contradicted by
23 an examining professional's opinion, the Commissioner may resolve the conflict by relying on
24 the examining physician's opinion if the examining physician's opinion is supported by different,
25 independent clinical findings. See *Andrews*, 53 F.3d at 1041; *Orn*, 495 F.3d at 632. Similarly,
26 to reject an uncontradicted opinion of an examining physician, an ALJ must provide clear and
27 convincing reasons. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). If an examining
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1 physician's opinion is contradicted by another physician's opinion, an ALJ must provide specific
 2 and legitimate reasons to reject it. Id. However, "[t]he opinion of a non-examining physician
 3 cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either
 4 an examining physician or a treating physician"; such an opinion may serve as substantial
 5 evidence only when it is consistent with and supported by other independent evidence in the
 6 record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.

7 **B. Analysis**

8 Dr. Tokutake in but a single treatment note reported that Plaintiff was temporarily
 9 incapacitated for six months and that Plaintiff "may benefit from permanent disability if [no]
 10 improvement [in] Schamberg's dermatitis and ganglion cysts." (AR 601.) Dr. Tokutake did not
 11 opine Plaintiff was disabled, only that Plaintiff would be disabled if there was no improvement.
 12 The ALJ gave Dr. Tokutake's opinion "no weight" because it was "purely speculative." (AR
 13 467.)

14 The ALJ rejected Dr. Tokukake's opinion for specific, legitimate reasons. An ALJ need
 15 not accept a treating physician's opinion if it is brief, conclusory and inadequately supported by
 16 medical evidence. Thomas, 278 F.3d 947, 957. That certainly was the case here, with
 17 Dr. Tokutake's "what if" speculation that, as it turns out, did not eventuate. The linchpin of the
 18 ALJ's decision is that Plaintiff's Schamberg's disease did improve. (AR 464-467.)

19 **V. THE ALJ'S STEP TWO FINDING WAS SUPPORTED
 20 BY SUBSTANTIAL EVIDENCE**

21 The ALJ found that at all times relevant to the decision, Claimant had the severe
 22 impairment of mild degenerative left knee joint disease. (AR 463.) Plaintiff suggests that the
 23 ALJ erred by not evaluating the severity of his right knee. There is medical evidence that both
 24 knees have mild degenerative joint disease. (AR 541, 548, 554.)

25 The ALJ's failure to state that Plaintiff's right knee impairment was severe, however, was
 26 harmless error. Tommasetti, 533 F.3d at 1038 (error is harmless if inconsequential to the
 27 ultimate non-disability determination). Had the ALJ not considered Plaintiff's right knee
 28 impairment and not proceeded to steps three, four and five of the sequential evaluation

1 process, there would have been reversible error. The ALJ, however, fully discussed both
2 knees, citing record evidence of mild degenerative disease in both knees. (AR 465.) The ALJ
3 cited record evidence that, despite both impairments, Plaintiff's functional mobility and balance
4 were fair. (AR 465.) The ALJ also found that there was no indication that Plaintiff needs an
5 assistive device for ambulation or that his gait and station are markedly impaired for other than
6 prolonged walking and standing. (AR 465.) The ALJ further discounted Plaintiff's alleged
7 inability to walk for reasons already discussed. The ALJ's omission of any severity finding
8 regarding the right knee was inconsequential to the ultimate non-disability determination and
9 thus harmless error.

10 * * *

11 The ALJ's RFC is supported by substantial evidence. The ALJ's non-disability
12 determination is supported by substantial evidence and free of legal error.

13 **ORDER**

14 IT IS HEREBY ORDERED that Judgment be entered affirming the decision of the
15 Commissioner of Social Security and dismissing this case with prejudice.

16 DATED: April 11, 2013

17 _____ /s/ *John E. McDermott* _____
18 JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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